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Vice President - Interconnection Services


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January 11, 2001

Mr. David Tatak
Director - Regulatory Affairs
Focal Communications Corporation
200 North LaSalle Street
11th Floor
Chicago, IL 60601

Re: Requested Adoption Under the FCC Merger Conditions - Washington

Dear Mr. Tatak:

Verizon Northwest Inc, f/k/a GTE Northwest Incorporated ("Verizon Washington"), has received your letter stating that, pursuant to paragraph 32 of the BA/GTE Merger Conditions ("Merger Conditions"), released by the FCC on June 16, 2000 in CC Docket No. 98-184, Focal wishes to provide services to customers in Verizon Washington's service territory in the State of Washington by adopting the voluntarily negotiated terms of the Interconnection Agreement between Time Warner Telecom and Verizon South Inc., f/k/a GTE South Incorporated ("Verizon South") that was approved by the North Carolina Utilities Commission as an effective agreement in the State of North Carolina, as such agreement exists on the date hereof after giving effect to operation of law (the "Verizon South Terms")¹.

I understand that Focal has a copy of the Verizon South Terms which, in any case, are attached hereto as Appendix 1. Except with respect to North Carolina state-specific pricing provisions, performance measures provisions, provisions that incorporate a determination reached in an arbitration conducted in the relevant state under 47 U.S.C. Section 252, provisions that incorporate the results of negotiations with a state commission or telecommunications carrier outside of the negotiation procedures of 47

¹ These "agreements" are not agreements in the generally accepted understanding of that term. Verizon South was required to accept these agreements, which were required to reflect then-effective FCC rules and other applicable law.

U.S.C. Section 252(a)(1), and any provisions not required by Section 251(c) of the Telecommunications Act of 1996 (the "Act") (including but not limited to any reciprocal compensation provisions which are also excluded as state-specific pricing provisions and, in any case, are not available for adoption under the Merger Conditions) contained in the Time Warner Telecom/Verizon South agreement, Verizon Washington does not oppose Focal's adoption of the Verizon South Terms at this time. However, please note the following with respect to Focal's adoption of the Verizon South Terms.

1. By Focal's countersignature on this letter, Focal hereby represents and agrees to the following three points:

(A) Focal adopts in the service territory of Verizon Washington, the Verizon South Terms of the Time Warner Telecom/Verizon South agreement, and in applying the Verizon South Terms, agrees that Focal shall be substituted in place of Time Warner Telecom in the Verizon South Terms wherever appropriate.

(B) Focal and Verizon Washington request that notice as may be required or permitted under the Verizon South Terms shall be provided as follows:

To Focal:

Director, Regulatory Affairs
200 N. LaSalle Street
Suite 1100
Chicago, IL 60601
Facsimile: 312-895-8403
Phone: 312-895-8400

To Verizon:

Director-Contract Performance & Administration
Verizon Wholesale Markets
600 Hidden Ridge
HQEWMNOTICES
Irving, TX 75038
Telephone Number: 972-718-5988
Facsimile Number: 972-719-1519
Internet Address: wmnotices@verizon.com

with a copy to:

Vice President and Associate General Counsel
Verizon Wholesale Markets
1320 N. Court House Road
8th Floor
Arlington, VA 22201
Facsimile: 703/974-0744

- (C) Focal represents and warrants that it is a certified provider of local telecommunications service in the State of Washington, and that its adoption of the Verizon South Terms will only cover services in the service territory of Verizon Washington in the State of Washington.

2. Focal's adoption of the Verizon South Terms shall become effective upon the date that Verizon Washington files this letter with the Washington Utilities & Transportation Commission, which Verizon Washington will promptly do upon my receipt of a copy of this letter, countersigned by Focal as to points (A), (B) and (C) of paragraph 1 above) and remain in effect no longer than the date the Time Warner Telecom/Verizon South agreement terminates or expires. The Time Warner Telecom/Verizon South agreement is currently scheduled to expire on May 11, 2002. Thus, the Verizon South Terms adopted by Focal also shall terminate or expire on that date.

3. As the Verizon South Terms are being adopted by Focal pursuant to the Merger Conditions, Verizon Washington does not provide the Verizon South Terms to Focal as either a voluntary or negotiated agreement. The filing and performance by Verizon Washington of the Verizon South Terms does not in any way constitute a waiver by Verizon Washington of any position as to the Verizon South Terms or a portion thereof. Nor does it constitute a waiver by Verizon Washington of any rights and remedies it may have to seek review of the Verizon South Terms, or to seek review of any provisions included in these Verizon South Terms as a result of Focal's election pursuant to the Merger Conditions.

4. Focal's adoption of the Verizon South Terms pursuant to the Merger Conditions is subject to all of the provisions of such Merger Conditions. For example, state-specific pricing, state-specific performance measures, provisions that incorporate a determination reached in an arbitration conducted in the relevant state under 47 U.S.C. Section 252, provisions that incorporate the results of negotiations with a state commission or telecommunications carrier outside of the negotiation procedures of 47 U.S.C. Section 252(a)(1), and provisions from the Time Warner Telecom/Verizon South agreement that are not required pursuant to Section 251(c) of the Act shall not apply to Focal's adoption of the Verizon South Terms in the State of Washington. In that regard, Verizon Washington's standard pricing schedule for interconnection agreements (as such schedule may be amended from time to time) (attached as Appendix 2 hereto) shall apply to Focal's adoption of the Verizon South Terms. Focal should note that the aforementioned pricing schedule contains rates for certain services the terms for which are not subject to adoption under the Merger Conditions (e.g., number portability and reciprocal compensation). In an effort to expedite the adoption process, Verizon Washington has not taken the time to delete such rates from the pricing schedule. However, the inclusion of such rates in no way obligates Verizon Washington to provide the subject services and in no way waives Verizon Washington's rights under the Merger Conditions. Verizon Washington will, nonetheless, if requested by Focal, work cooperatively with Focal to the extent necessary to identify any other provisions of the Time Warner Telecom/Verizon South agreement including provisions that incorporate a determination reached in an arbitration conducted in the relevant state under 47 U.S.C. Section 252, provisions that

incorporate the results of negotiations with a state commission or telecommunications carrier outside of the negotiation procedures of 47 U.S.C. Section 252(a)(1), and provisions that are not required pursuant to Section 251(c) of the Act that are not subject to the MFN obligations of the Merger Conditions so that Focal, should it desire similar terms in Washington, may evaluate its options for obtaining such similar terms under applicable law.

As noted directly above, under the terms of paragraph 32 of the Merger Conditions, the MFN requirements in the Merger Conditions are exclusive of price terms, and prices applicable to interconnection arrangements are to be established on a state-specific basis. In addition, paragraph 32 of the Merger Conditions provides that Verizon Washington is not obligated to permit a carrier to adopt any interconnection arrangement unless the arrangement "is consistent with the laws and regulatory requirements of the state for which the request is made[.]" Thus, by Focal's adoption of the Time Warner Telecom/Verizon South agreement for Washington, Focal must accept the pricing terms applicable to CLECs in the State of Washington, and it will not be entitled to terms and arrangements inconsistent with Washington law and policy.

In addition, the Merger Conditions' MFN obligation on which Focal relies extends only to interconnection arrangements, UNEs, or provisions of an interconnection agreement that are "subject to 47 U.S.C. § 251(c)" As you know, the obligation of local exchange carriers to pay one another reciprocal compensation for local traffic is found not in Section 251(c), but in Section 251(b), of the Act. On its face, therefore, the Merger Conditions' provision on which Focal relies does not extend to the reciprocal compensation provisions of Verizon South's interconnection agreements or to any other provisions therein not required by Section 251(c).

Even if this provision of the Merger Conditions were to be misconstrued as encompassing not only items subject to Section 251(c), but also items subject to Section 251(b), it would still not obligate Verizon Washington to permit the cross-state adoption of compensation terms pertaining to Internet traffic. The FCC's February 1999 order expressly found that Internet traffic is not local. Accordingly, even if the Time Warner Telecom/Verizon South agreement were mistakenly construed as containing a voluntary commitment to pay compensation on Internet traffic, that commitment would be entirely outside the scope of the requirements of Section 251, and therefore not subject to the cross-state MFN provisions of the Merger Conditions.

In addition, Focal's adoption of the Verizon South Terms shall not obligate Verizon Washington to provide any interconnection arrangement or unbundled network element unless it is feasible to provide given the technical, network and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of Washington and with applicable collective bargaining agreements.

5. On January 25, 1999, the Supreme Court of the United States issued its decision on the appeals of the Eighth Circuit's decision in Iowa Utilities Board. The Supreme Court modified several of the FCC's and the Eighth Circuit's rulings regarding

unbundled network elements and pricing requirements under the Act. *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999). Certain provisions of the Verizon South Terms may be void or unenforceable as a result of the Supreme Court's decision of January 25, 1999, the United States Eighth Circuit Court of Appeals' recent decision in Docket No. 96-3321 regarding the FCC's pricing rules, and any related appeals applicable to the FCC's new UNE rules or UNE pricing rules. Moreover, nothing herein shall be construed as or is intended to be a concession or admission by Verizon Washington that any provision in the Verizon South Terms complies with the rights and duties imposed by the Act, the decisions of the FCC and the Commissions, the decisions of the courts, or other law, and Verizon Washington expressly reserves its full right to assert and pursue claims arising from or related to the Verizon South Terms.

6. Verizon Washington reserves the right to deny Focal's adoption and/or application of the Verizon South Terms, in whole or in part, at any time:

when the costs of providing the Verizon South Terms to Focal are greater than the costs of providing them to Time Warner Telecom;

if the provision of the Verizon South Terms to Focal is not technically feasible;

if Verizon Washington otherwise is not obligated to permit such adoption and/or application under the Merger Conditions or under applicable law.

7. As noted above in paragraph 6, pursuant to Rule 809 of the FCC Regulations, the FCC gave ILECs the ability to deny 252(i) adoptions (and adoptions pursuant to the Merger Conditions, since the 252(i) rules also apply thereto) in those instances in which the cost of providing the service to the requesting carrier is higher than that incurred in serving the initial carrier or in which there is a technical incompatibility issue. The issue of reciprocal compensation for traffic destined for the Internet falls within this exception. Verizon Washington never intended for Internet traffic to be included within the definition of local traffic and subject to the corresponding obligation of reciprocal compensation. Whatever doubt any party may have had with respect to this issue was removed by the Declaratory Ruling that the Federal Communications Commission (the "FCC") released on February 26, 1999 which, among other things, "conclude[d] . . . that ISP-bound traffic is non-local interstate traffic."² The FCC also reaffirmed that "section 251(b)(5) of the Act and [the FCC] rules promulgated pursuant to that provision concern inter-carrier compensation for interconnected *local* telecommunications traffic."³ Based on the FCC's Declaratory Ruling (among other things), it is clear that Internet traffic is not local traffic. Despite the foregoing, some forums have required reciprocal

² Declaratory Ruling in FCC CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (rel. February 26, 1999), fn. 87. The D.C. Circuit Court has recently asked the FCC to explain more fully its reasoning in arriving at this conclusion in the Declaratory Ruling, but it has not rejected the conclusion. The FCC, moreover, has publicly since reiterated the correctness of its conclusion.

³ *Id.* (emphasis in original).

compensation to be paid. This produces the situation in which the cost of providing the service is not cost based. With this in mind (as well as the other bases noted in this letter), Verizon Washington opposes, and reserves the right to deny, the adoption and/or the application of the provisions of the Verizon South Terms that might be interpreted to characterize traffic destined for the Internet as local traffic or requiring the payment of reciprocal compensation. However, Verizon Washington shall, in any case, comply with the requirements of applicable law with respect to this issue.

8. Should Focal attempt to apply the Verizon South Terms in a manner that conflicts with paragraphs 3-7 above, Verizon Washington reserves its rights to seek appropriate legal and/or equitable relief.

Please arrange for a duly authorized representative of Focal to sign this letter in the space provided below and return it to the undersigned.

Sincerely,

Verizon Northwest Inc.

Jeffrey A. Masoner
Vice President-Interconnection Services

Reviewed and countersigned as to points A, B, and C of paragraph 1:

Focal Communications Corporation

By _____

Title _____

Attachments